No. 86-1686

In the Supreme Court of the United States

OCTOBER TERM, 1986

FORD MOTOR COMPANY, PETITIONER

v.

KATHY ANDERSEN, *et al.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Although both the majority (Pet. App. 11a-12a) and the dissent (*id.* at 15a) in the court of appeals acknowledged that the circuits are in conflict over the issue in this case, respondents vehemently deny the existance of a conflict. According to respondents, this case is distinguishable from the Fifth, Sixth, Ninth and Eleventh Circuit cases described in the Petition because the alleged misrepresentations here (a) were made before respondents became employees and (b) did not concern respondents' rights under the collective bargaining agreement. But respondents' first distinction is irrelevant to the preemption issue under Section 301, and their second distinction is simply inaccurate.

First, respondents claim (Br. in Opp. 11) that this case is unique because Ford's alleged misrepresentations were made *before* they accepted offers of employment. The plaintiffs in *Eitmann* and *Bale*, however, also alleged that their state law claims were based upon false statements

made prior to the time they became employees. See *Eitmann*, 730 F.2d at 360; *Bale*, 795 F.2d at 777. The Fifth and Ninth Circuits nonetheless held that the plaintiffs' claims were preempted by Section 301, because (a) adjudication of the claims would have required interpretation of the collective bargaining agreement and (b) the claims accrued at a time when the plaintiffs were members of the collective bargaining unit and had access to the grievance procedures of that agreement. See *Eitmann*, 730 F.2d at 362-363; *Bale*, 795 F.2d at 779-780.

Here, too, the timing of the alleged false statements is quite beside the point. Just as in *Eitmann* and *Bale*, a court hearing respondents' tort and breach of contract claims would be forced to interpret the Ford-UAW agreement, and respondents' claims all result from the termination of their employment with Ford, which occurred at a time when they unquestionably were covered by the Ford-UAW agreement and could have pursued their rights under that agreement.[1] Accordingly, as in *Eitmann* and *Bale*, these state law claims should have been held preempted by federal law.

Indeed, no other result would make sense, given the policies that the Section 301 preemption doctrine is designed to serve. The crucial question under *Lueck* is whether "any attempt to assess liability on the part of the employer would inevitably involve interpretation of the underlying collective-bargaining contract" (*International Brotherhood of Electrical Workers* v. *Hechler*, No.

[1] Respondents are plainly wrong in stating that "[t]hey were not covered by the Collective Bargaining Agreement and as a result had no rights under it" (Br. in Opp. 11). As we noted in the Petition (at 19), the agreement expressly covered probationary employees, such as respondents, who had been on the job for more than 30 days, and both parties to the agreement—Ford and the UAW—were of the view that respondents' terminations could have been challenged through the grievance mechanism. Respondents do not cite a single provision of the agreement or arbitration decision construing the agreement to support their self-serving interpretation.

85-1360 (May 26, 1987), slip op. 7) and would thus jeopardize the need for uniformity in the interpretation of labor contracts through arbitral dispute resolution. As the Court recently remarked in *Hechler*, slip op. 6 (quoting *Lueck*, 471 U.S. at 211):

> [I]f state law * * * were allowed to determine the meaning of particular contract phrases or terms in a collective-bargaining agreement, "all the evils addressed in *Lucas Flour* would recur"; the "parties would be uncertain as to what they were binding themselves to" in a collective-bargaining agreement, and, as a result, "it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate."

It is obvious that Congress's goal of uniformity in contract interpretation would be jeopardized whenever state law is allowed to govern the meaning of terms in a collective bargaining agreement. Respondents do not offer *any* rationale for a distinction based upon the timing of a false statement said to make a later job termination unlawful.[2]

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[2] Respondents assert (Br. in Opp. 11 n.3) that their reading of *Lueck* is supported by the Eleventh Circuit's recent decision in *Varnum*, but that decision is plainly distinguishable. The employee in *Varnum* challenged his employer's pre-hire failure to disclose pending changes in the collective bargaining agreement, rather than alleging that his employer misrepresented employment conditions under that agreement. 804 F.2d at 640. Thus, it would not have been necessary for a court to construe the terms of the agreement by reference to state law. Moreover, Varnum's "failure to disclose" claim was not an attempt to enforce an individual contract of employment and thus raised none of the concerns about "individual dealings" that pervade this case, *Eitmann* and *Bale*. Finally, because Varnum resigned, his injuries were not the result of an employer-initiated layoff or discharge, and therefore his request for relief (which did not involve a demand for reinstatement) could not have been processed through the contractual grievance mechanism. These differences may explain why the Eleventh Circuit in *Varnum* did not mention, much less attempt to reconcile its ruling with, *Lueck*, *Mason*, or *Redmond*. See Pet. 24 & n.8.

Second, respondents contend (Br. in Opp. 12) that *Eitmann* and *Bale* are distinguishable because "the employer in each case actually misrepresented the terms of the collective bargaining agreement to the employees" whereas "[t]he Respondents in the present case have not alleged that Ford misrepresented the terms of the Collective Bargaining Agreement." Respondents are wrong on both scores.

In neither *Eitmann* nor *Bale* was the finding of preemption based on the notion that the employees' state law cause of action charged the employer with misrepresenting the terms of the collective bargaining agreement *per se*. Thus, in *Eitmann*, the Fifth Circuit's discussion of the collective bargaining agreement (730 F.2d at 360-361), the plaintiff's complaint and his theory of the case (*id.* at 361-362), and the defendant's employment practices and "the industrial common law" (*id.* at 363) all made clear that nothing in the agreement expressly dealt with continuation of compensation during periods of disability resulting from work-related injuries. In fact, Eitmann attempted to avoid preemption by arguing that the collective bargaining agreement did not address the subject of his claims and that his claims therefore were "not inconsistent with" the terms of the agreement. *Id.* at 362.

Moreover, the Fifth Circuit did not rule against Eitmann because it concluded that the rights he asserted were derived from the collective bargaining agreement. Rather, the court found that Eitmann's claim of an individual contract with his employer, which would have precluded his discharge because of disability, sought "to 'limit or condition' the terms of the collective bargaining agreement, which established the terms and conditions of employment, including discharge." *Eitmann*, 730 F.2d at 363. The Fifth Circuit refused to allow an "employee[] who [was] covered by a collective bargaining agreement * * * to bring an action on an alleged *separate* contract." *Id.* at 364 (emphasis added).

Similarly, in *Bale*, the plaintiffs alleged that they were terminated in violation of pre-hire promises that they would become "regular" rather than merely "temporary" employees. Like respondents, the plaintiffs in *Bale* contended that their state law claims arose not from the interpretation of the collective bargaining agreement but from *separate* and *unrelated* pre-hire representations. 795 F.2d at 779. The Ninth Circuit held that the plaintiffs' claims nonetheless were preempted by Section 301:

> In order to prove their * * * claims, [the plaintiffs] would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believed they had made. Resolution of their state tort claims is therefore "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract."

795 F.2d at 780, quoting *Lueck*, 471 U.S. at 220.

Thus, contrary to respondents' revisionist view (Br. in Opp. 12), the plaintiffs in both *Eitmann* and *Bale* alleged that their state claims were based on pre-hire representations wholly separate and distinct from the terms of the collective bargaining agreement. The Fifth and Ninth Circuits accepted that characterization, but held that the claims still were preempted by Section 301 because their resolution would require interpretation of the labor agreement. This case is indistinguishable from *Eitmann* and *Bale* and compels precisely the same conclusion.

In any event, even if respondents' reading of *Eitmann* and *Bale* were plausible, it would not distinguish those cases from the present one. Simply stated, it is preposterous for respondents to suggest that their state law claims do not involve the contention that Ford misrepresented their rights under the collective bargaining agreement. Respondents' complaint asserts, for example, that

Ford misrepresented that it "was offering [respondents] • • • work as permanent, full-time employees" and that respondents "would not be laid off unless there was a slump in the economy and in truck sales" (C.A. App. 92). As former Ford employees (see Br. in Opp. 4), however, respondents certainly were aware that the terms and conditions of their employment would be governed by the Ford-UAW agreement. Accordingly, the allegations in their complaint can only be read to mean that Ford misrepresented what their rights would be under that agreement.

2. Respondents attempt to belittle the importance of the question presented by arguing (Br. in Opp. 9) that this case involves nothing more than an application of the test announced in *Lueck* to a particular set of facts. To the contrary, the case involves a legal issue that arises with great frequency, the lower courts are hopelessly confused about how the *Lueck* test applies, and there is a compelling practical need for a clear answer. As we pointed out in the Petition (at 27), and as the large number of recent appellate decisions confirms, "it would be the rare employee who could not package his complaint as an 'independent' state cause of action by recalling pre-hire statements seemingly at odds with his subsequent termination." Moreover, if the decision below represents a correct application of the *Lueck* standard, then *Lueck* means very little indeed.

Respondents repeatedly urge that "[t]hey do not allege that Ford violated the Collective Bargaining Agreement in any way" (Br. in Opp. 6) and that their "causes of action were not derived from the rights and obligations provided by the Collective Bargaining Agreement" (*id.* at 8). These assertions, however, merely indicate that respondents misunderstand the relevant test for Section 301 preemption. The controlling standard under *Lueck* is *not* whether an employee's state law claim derives from or alleges a violation of a collective bargaining agreement, but whether "resolution of [the] state-law claim

is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract" (*Lueck*, 471 U.S. at 220). See *Hechler*, slip op. 1.[3]

We explained in the Petition why it would be impossible to resolve respondents' claims without confronting the meaning of the Ford-UAW contract at every turn. It would be necessary to construe the collective bargaining agreement to determine whether respondents' alleged pre-hire contracts conflicted with the agreement and whether Ford's alleged pre-hire statements misrepresented the agreement. See Pet. 14, 17-18. It would be necessary to construe the collective bargaining agreement to determine the validity of various defenses. See *id.* at 15-16. And it would be necessary to construe the collective bargaining agreement to determine the relief to which respondents would be entitled if their discharges were unlawful. See *id.* at 16-17 & n.5. Respondents make no attempt to answer these arguments.

Indeed, respondents' requests for relief show why this case poses a far more serious threat to federal labor law policies than *Lueck* itself. The issue in *Lueck* was whether an employee could bring a state law tort claim alleging that his employer acted in bad faith in refusing

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[3] Of course, even if respondents' test were the correct one under *Lueck*, their claims would not meet it. Thus, although respondents deny relying on the collective bargaining agreement, their complaint makes repeated reference to that agreement (see C.A. App. 91, 95, 99, 102). Similarly, although respondents assert that "their claims do not challenge their termination" (Br. in Opp. 2), respondents' complaint expressly and repeatedly refers to their terminations as an essential element of their causes of action (see C.A. App. 95 (¶ 18), 96 (¶ 21), 99 (¶¶ 33, 34), 100 (¶ 38), 101 (¶ 49)) and expressly seeks reinstatement and other rights under the Ford-UAW agreement as a remedy (see C.A. App. 102 (¶ 3)). Finally, respondents can hardly deny that their claims "derive from" the administration of the preferential placement agreement. See Pet. 17-18 & n.7.

to make disability insurance payments under a negotiated disability plan. The state court could have awarded relief in that case without substantially affecting the rights of the union or the other members of the collective bargaining unit. The Court nonetheless held that the state claim was preempted because the litigation would adversely affect "[t]he interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law" (*Lueck*, 471 U.S. at 211) and would "eviscerate a central tenet of federal labor-contract law under § 301" favoring resolution of disputes through arbitration (*id.* at 220).

Compare the situation here. Relying on their rights under *state* law, and asserting *both* tort and contract claims, respondents have demanded reinstatement to their bargaining unit positions (C.A. App. 101-102 (¶ 1)), with back pay and fringe benefits measured by the provisions of the Ford-UAW agreement (C.A. App. 102 (¶ 3)); they have demanded specific performance of Ford's alleged promises to let them work for 10 to 20 years as "permanent, full-time employees" who "would not be laid off unless there was a slump in the economy" (C.A. App. 102 (¶ 2); see also C.A. App. 93 (¶ 9)); and they have demanded retroactive seniority (C.A. App. 102 (¶ 1)).

It is not difficult to envision the devastating impact that a grant of this relief would have on the collective bargaining relationship and the rights of the Union and other Ford employees. It would create a class of super-employees at Ford with rights—specified in separately-negotiated individual agreements, and enforced by an injunction issued under state law—that go far beyond those set forth in the Ford-UAW contract; it would jump junior employees over senior employees in seniority; and it might well require the dismissal of current members of the work force. Respondents make no attempt to explain

how these results can possibly be squared with federal labor policy.

Respectfully submitted.

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